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In the Supreme Court of the United States

OCTOBER TERM 1964.

No. 189.

THE FANNER MANUFACTURING COMPANY,

Petitioner,

vs.

PREFORMED LINE PRODUCTS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

SUPPLEMENTAL BRIEF IN OPPOSITION.

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Respondent submits the following supplemental brief in opposition to cover additional points raised by petitioner's reply brief:

I.

THE PASSAGE OF TIME ALONE HAS NOT BEEN THE CRITERIA OF THE JUDGMENTS BELOW.

A. The District Court's Selection of August 1, 1961 as the Purge Date.

Petitioner has stressed the point that the District Court did not fix the purge date as of the conclusion of the hearing on June 15, 1961, but rather as of August 1, 1961. From this circumstance, petitioner curiously argues that

lapse of time was the sole criterion considered. The facts demonstrate the contrary. The District Court fixed the purge date on August 1, 1961, and not earlier, for reasons fully known to but never mentioned by petitioner in either of its briefs in this Court.

The District Court had held that U. S. Patent No. 2,609,653 (hereinafter referred to as Patent No. 3) was invalid (215a-26a), or if valid that petitioner had an implied license thereunder. (244a.) Subsequently, on advice of patent counsel, respondent continued to refer to said patent in its quotations to customers, correspondence and advertising literature.* On July 10, 1961, approximately one month after the purge trial, the District Court called counsel together and orally criticized respondent's references to Patent No. 3. (¶11 of the purge findings, 4-A.) On July 14 the Court entered an interlocutory order requiring respondent to stop such references and to give broad notice of the determination of the Court regarding Patent No. 3 and of the fact that references thereto would no longer be made by respondent in submitting quotations to customers and elsewhere. (335a.)

Findings 12-17 enumerate the steps taken by respondent to comply with the interlocutory order of July 14th and show that respondent began elimination of the criticized references the very day the Court orally stated its criticism. (3-A—4-A.) Petitioner made no attempt to

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* Respondent contended in the Court of Appeals that such references were wholly proper both because the judgment of the District Court was not final during the period in which the references were made and because under well established principles of law petitioner had the right to relitigate the question of validity against any person other than petitioner. Respondent further maintained that, if misuse of Patent No. 3 be assumed arguendo, such misuse did not infect Patent No. 4.

controvert respondent's proof of its compliance, submitted on July 27, 1961. (¶ 18 of the purge findings, 4-A.)

The peripheral controversy over references to Patent No. 3 had no impact upon, indeed nothing whatever to do with, the dissipation of the effects of the misuse of Patent No. 4. Paragraph 10 of the purge findings reads:

> '10. Plaintiff has ceased any improper practices or misuse of Patent No. 4, and no consequences of its past misuse of said patent were continuing on June 15, 1961." (3-A.)

Conclusion of Law number one of the purge hearing reads:

> "1. Plaintiff has wholly abandoned its improper practices or misuse of Patent No. 4 since January 6, 1960, and the consequences of its past misuse were fully dissipated by June 15, 1961." (5-A.)

That the District Court well knew that dissipation of the effects of misuse does not follow automatically from the abandonment of illegal practices is shown by the quotation in the first full paragraph of page two of petitioner's reply brief. There, as early as February 26, 1960, the District Court recognized the existence of both a "when" and a "how" question on purge. (269a.) Indeed, the District Court leaned over backwards to insure that any illegal effects of the misuse of Patent No. 4 were dissipated and that respondent was utilizing all the patents in suit in a lawful manner. The District Court's attitude toward and rulings upon Patent No. 3 show that it was determined to give the benefit of the doubt to petitioner.

Even so, with respect to Patent No. 3, the District Court never found that there were any harmful effects from the references to Patent No. 3, nor did the petitioner ever contend that there were any.

B. The Court of Appeals Equated the Word "Time" With the Word "Date."

The Court of Appeals, in the quotation from the opinion on page 2 of petitioner's reply brief, did not rely on the "passage of time." As is clear from the earlier portion of the quoted paragraph, Judge Cecil was using the terms "time" and "date" interchangeably to mean "date":

> "The plaintiff has attempted to fix its own *date* as to the *time* the purge was effected. It arrives at this *date* as the *time* that it discontinued its illegal practices. That is only a part of the requirement for a purge. The *date* of the discontinuance of illegal acts can be ascertained with a fair degree of certainty but the *date* when the consequences of such acts are dissipated cannot be determined with precision. We think the *time* fixed by the trial judge for the dissipation of the consequences of the misconduct is fair and reasonable and not an abuse of his discretion." (Emphasis added.) (36-A.)

II.

PETITIONER HAS MISINTERPRETED CLAIM 14 IN ITS ARGUMENT ON MISUSE.

Petitioner has undertaken to engraft helical "legs" upon Claim 14. Although the word "legs" is used six times in petitioner's two pages of argument on this issue, the word nowhere appears in said claim. The only elements called for in Claim 14 are "a plurality of *helices*."

Each helix is a single preformed wire similar to Figure 1 of the patent in suit (167a), a plurality of which are intertwisted with each other into a half lay. From such half lays, dead ends as depicted at page 11 of the petition are formed. As associated in this manner the helices are mutually intertwisted about a common axis. *This* is the "intertwisting" referred in Claim 14.

Additionally, Claim 14 does not include a cable or "linear body" as a positive element of the claim. The only reason for mentioning a "linear body" is to aid in defining the dimensions of the helix diameter and pitch length. Contrary to petitioner's argument, no reference is made to intertwisting upon a "linear body" as argued by Petitioner.

The District Judge correctly noted the distinction between the intertwisting of the individual wire helices and the intertwisting of the legs of the half lays (235a):

> "The element of half-lays appears in Claims 1, 3, 5 and 6 of Patent No. 4. *A half-lay may be roughly defined as a plurality of helical elements applied against each other and inter-twisted together.* A half-lay is one-half of a tubular body of inter-twisted elements which constitutes a whole lay. Method Claim No. 6 of Patent No. 4 succinctly describes a dead end in which the bight consists of half-lays and the reinforcement of the cable is a whole-lay. Claim No. 6 reads:
>
> "The method of forming an elongated body having a bight integrally fashioned thereon, which comprises forming a half-lay of helically performed elements, bending the half-lay back upon itself to define a bight and two half-lay legs, and intertwisting said legs to provide a whole-lay body upon said bight."
>
> Claim No. 8 of the patent defines a dead end comprising an elongated body to be dead ended and a single helical element of constant open pitch throughout its length being bent adjacent its middle *to form a bight with legs projecting therefrom, the legs being wrapped around said body so that the helix of one leg is in substantially 180 degree phase relationship with the helix of the other* throughout their co-extensiveness along the elongated body. Claims 9, 10 and 11 are dependent upon Claim No. 8 and are substantially similar to the latter except that they provide for two or more helical elements. *Claim No. 14 recites a plurality of helical elements "intertwisted into associa-*

tion coaxially with each other and, as associated, defining a relatively straight linear body gripping portion and a curved bight portion at one end of said gripping portion."

The foregoing is sufficient to indicate the scope and nature of the teachings of Patent No. 4." (Emphasis added.)

From the foregoing, it is plain that petitioner has misconceived the meaning of Claim 14, which is clearly addressed to the dead end as sold by respondent, without regard to the intertwisting of "legs" or to association with a "cable."

Even if petitioner were correct in its interpretation of Claim 14, it still could not prevail. Petitioner continues to ignore the applicable provisions of 35 U. S. C. § 271. Respondent developed its alternate position, relying on § 271, in its brief in opposition. (See Section II, Brief in opposition pp. 10-12.) Petitioner has made no gesture of reply thereto.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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